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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

JOHN DOE, ET AL.,

Plaintiffs.

v.

COMMISSIONER, NEW HAMPSHIRE
DEPARTMENT OF HEALTH AND HUMAN
SERVICES, ET AL.,

Defendants.

* * * * *

No. 1:18-cv-1039-JD
April 2, 2020
10:00 a.m.

TRANSCRIPT OF MOTION HEARING
VIA VIDEOCONFERENCE
BEFORE THE HONORABLE JOSEPH A. DiCLERICO, JR.

APPEARANCES:

For the Plaintiffs: Aaron J. Curtis, Esq.
Colin McGrath, Esq.
Weil Gotshal & Manges

For the Intervenor
Plaintiffs: Michael D. Ramsdell, Esq.
Sheehan Phinney Bass & Green

For the Defendants: Samuel R.V. Garland, Esq.
NH Attorney General's Office
Civil Bureau

Court Reporter: Brenda K. Hancock, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

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P R O C E E D I N G S

THE CLERK: The Court has before it for consideration today via video a motion hearing in Civil Case 18-cv-01039-JD, Doe versus New Hampshire Department of Health and Human Services, et al.

THE COURT: Good morning to everybody. As you're all well aware, we are facing difficult challenges due to the coronavirus. The Court is making every effort consist with health, safety and governmental directives to keep the business of the court moving forward to the extent practicable. The Court is also aware of the important principles of public access to court hearings and has tried to accommodate that for today's hearing. So, public access has been granted to a number of those who have requested it.

I would like to remind those who have been granted public access to this hearing of Local Rule 83.8, which I understand has been provided to you by the Deputy Clerk, but I will read it. It provides that all persons participating in court proceedings remotely, by video conference or teleconference, shall not photograph, broadcast or televise any of these court proceedings. This prohibition applies to counsel, parties, the media and any member of the public. By "photograph," that means still or video photograph. The Court expects you to comply with this rule, and I have every confidence that you will.

1 I would like to remind all of us as participants that
2 we should make an effort not to talk over each other.
3 Sometimes there is a delay with the sound, so we should all try
4 to be mindful of waiting until the speaker has finished before
5 asking a question or making a remark. This will also make it
6 easier for our court reporter, who is taking a record of this
7 hearing.

8 Now, the Commissioner has filed the pending Motions to
9 Dismiss, so we will start with Mr. Garland, who is counsel for
10 the Commissioner, and what I would like Mr. Garland to do is to
11 focus at the outset as to how the Commissioner is interpreting
12 and applying the Involuntary Admissions statute and the
13 reasoning and justification for that interpretation, since that
14 is one of the major issues in this case. Mr. Garland.

15 MR. GARLAND: Thank you, your Honor. And I told
16 Kellie earlier on, and I just want you to know, and you may
17 well already, Dan Will is with me. He is not appearing by
18 video, but he's filed an appearance in the case, and we are
19 socially distancing right now.

20 So, with respect to the statutory construction of
21 RSA 135-C, it appears that there are three arguments that the
22 plaintiffs and intervenors are making as to how there is state
23 action under that statute, and I believe my response to those
24 arguments will set forth how we are constructing that statute
25 and why we believe that not to be the case, but I obviously

1 welcome any questions that you might have as I go through that.

2 There is a suggestion that RSA 135-C obligates
3 hospitals to seek involuntary emergency admissions or to
4 participate in that process in the first place. We do not
5 believe that the statutory language as structured supports
6 that. The petition is filed by any individual. That's RSA
7 135-C:28, I and Judge McAuliffe in Trimble noted that "any
8 individual" encompasses many private actors. Medical
9 professionals at private facilities are the ones who complete
10 the certificates, and so that's the process that happens after
11 a petition is filed. They are also private actors under the
12 statute.

13 There's a suggestion, I believe, in the hospital
14 surreply that, because designated receiving facilities approve
15 the individuals, the medical professionals who complete the
16 certificates, that somehow creates state action, and we don't
17 believe it does. We believe that Judge McAuliffe correctly
18 rejected that in Trimble, and we would liken it to a licensing
19 or permitting regime that requires certain professionals in
20 many different walks of life to be approved by the State, but
21 that doesn't confer upon them state action.

22 THE COURT: Excuse me a minute. Let's begin at the
23 beginning. Am I correct that the Department's website directs
24 people to hospital emergency rooms because there are no walk-in
25 emergency or crisis services available at the New Hampshire

1 Hospital, so they are -- people are directed to the emergency
2 rooms. Is that correct?

3 MR. GARLAND: That is correct, your Honor. We don't
4 dispute that characterization.

5 THE COURT: And they're also told, as I understand it
6 now, that they may have to wait --

7 MR. GARLAND: I believe that's correct as well.

8 THE COURT: -- if they're admitted. They may end up
9 having to wait there. So, you've got the Department
10 instructing people to go to the emergency department. Now, I
11 think you just said that emergency departments don't have to
12 handle these cases.

13 MR. GARLAND: So, I don't think they have to handle
14 them through the involuntary commitment process, your Honor. I
15 do think there may be other obligations, EMTALA, common-law
16 duties, other obligations that requires that an emergency
17 department stabilize, maybe even treat, and there may be
18 prudential concerns that a hospital would have that it would
19 not just reject a patient. But the decision to invoke the
20 emergency -- or the commitment process in general -- but the
21 emergency involuntary admission process we believe is a
22 voluntary one. We believe that's reflected in the statute.
23 And so, there are other options that a hospital could have.

24 THE COURT: Well, whether a person has a severed
25 artery and appears in an emergency room, or whether that person

1 is having a serious mental crisis, those are emergencies,
2 whether it's physical or mental, that have to be addressed, and
3 isn't the hospital under an obligation by State statute to
4 address that emergency?

5 MR. GARLAND: Your Honor, are you specifically
6 referring to Chapter 135-C or another State statute?

7 THE COURT: I'm referring to, well, first of all,
8 151:2-g, which says that every facility licensed as a hospital
9 shall operate an emergency department. So, the hospital is
10 obligated to have an emergency department offering emergency
11 services to all individuals.

12 MR. GARLAND: Okay. Yes.

13 THE COURT: So, the hospital is obligated by law to
14 accept these patients and to address their needs, is it not?

15 MR. GARLAND: I believe that's correct, your Honor.
16 But where I would draw a distinction is I don't believe that
17 they are obligated by law or by virtue of Chapter 135-C to
18 invoke the involuntary commitment process. There may be
19 reasons why they would choose to do that, and we don't dispute
20 that, and there may be very legitimate reasons, but it's not a
21 requirement. I mean, a hospital could always choose to treat a
22 patient as opposed to trying to have them committed to the
23 State mental health system.

24 THE COURT: If a patient meets the requirement for
25 involuntary emergency admission under the statute, then isn't

1 the hospital obligated to follow that procedure and issue a
2 certificate? On page 11 of the Commissioner's brief there's
3 this sentence that if a private hospital does not want to hold
4 a patient it does not need to complete an IEA petition or
5 certificate in the first instance. Is that really the position
6 that the Commissioner is taking here?

7 MR. GARLAND: Your Honor, I believe -- I would make
8 two points to the first question, but I do believe that, yes,
9 the position is that it's not obligated under the law. There
10 may be specific reasons why a hospital would choose to do that,
11 and we don't dispute that. But with respect to the process as
12 set forth in 135-C being mandatory, we don't believe that the
13 language of the statute requires that or supports that
14 conclusion. And I would -- and, forgive me; I'm looking at a
15 notebook here.

16 THE COURT: Sure.

17 MR. GARLAND: 135-C:27 and also 135-C:28,I. In
18 135-C:27 it says that a person shall be eligible for
19 involuntary emergency admission if the conditions, the mental
20 conditions that are set forth there are present. It says shall
21 be eligible, but it doesn't say they shall be admitted, so we
22 do think that that means that it is not mandatory. But I think
23 more telling is in RSA 135-C:28,I, which contemplates that,
24 once a petition has been filed it does require that the
25 physician, the physician's assistant or the APRN conduct an

1 examination, but I don't think it requires, your Honor, that a
2 certificate be completed. It states -- and forgive me as I'm
3 going through this -- I may actually be missing the point I was
4 trying to make with respect to that. But I think the larger
5 point is it does say the admission may be ordered upon a
6 certificate, and the only specific thing that the statute
7 requires is that, when the petition is filed that the
8 physician's assistant, the physician, the APRN conduct an
9 examination. I don't read that statute to require that a
10 certificate then be completed, and I don't think the statutory
11 language supports a requirement that someone then be admitted
12 if a certificate is completed. I think the admission may be
13 ordered is discretionary, not mandatory.

14 THE COURT: So, if the person, if the presenting
15 patient meets all the criteria for admission you're saying the
16 hospital can say, Well, we're not going to do it?

17 MR. GARLAND: Right. Yes, your Honor. I believe the
18 decision what to do under those circumstances would be up to
19 the professional judgment of the medical provider, and it could
20 be that the hospital chooses to treat the patient as opposed to
21 seek to admit them. I mean, there are hospitals --

22 THE COURT: That's right. All right. So, let's get
23 past that first issue, and referring back to Section I of 28
24 that you just referred to, we now have a patient who has met
25 the requirements, and the medical judgment is that this patient

1 must be admitted under the involuntary procedure, and the very
2 first sentence there says, "The admission is to the state
3 mental health services system." So, when that certificate
4 issues isn't it to the system that this person is admitted at
5 that point in time?

6 MR. GARLAND: Your Honor, we do not believe that the
7 person is admitted to the system at that point in time. We
8 believe that the admission occurs once they are admitted to a
9 designated receiving facility or a New Hampshire Hospital, and
10 the reason for that -- there are a few different reasons for
11 that. The first is that -- and I know this is a highly
12 disputed part of this case -- but we do not believe the statute
13 supports the conclusion that a private hospital that is not a
14 designated receiving facility or a portion of a hospital that
15 is not a designated receiving facility is part of the State
16 mental health system under the supervision of the Commissioner.
17 And the reason for that is --

18 THE COURT: But the person -- it's the patient who has
19 been admitted to the system, so the system is now responsible
20 for that patient.

21 MR. GARLAND: Your Honor, I believe our reading of it
22 is that the patient is admitted to the system when they are
23 actually physically admitted to a designated receiving facility
24 or a New Hampshire Hospital, not by virtue -- not by operation
25 of a certificate being completed.

1 THE COURT: Well, if you look at Section 1 again,
2 there are really two types of admission. You've got admission
3 to the system, and then later on in the paragraph the admission
4 is made to the facility. So, you've got two types of
5 admission. First, you come into the system and then you're
6 admitted to a facility. But anyway.

7 Now, one thing I wanted to ask you is in the
8 Commissioner's memo you've referred to I believe it's Section
9 20, 29 or 39. 39. In the Commissioner's memorandum you've
10 taken the position that Section 29 applies to someone who's
11 been admitted and that they're at liberty pending the hearing.
12 Now, Section 39 of 135 is part of the nonemergency involuntary
13 admission procedure. That really has nothing to do with the
14 emergency procedure. Do you agree with that? Do you agree
15 that you've misread that?

16 MR. GARLAND: No, your Honor.

17 THE COURT: How am I misreading it?

18 MR. GARLAND: Okay. So, the analysis that we've
19 conducted with respect to colon 39 is that it's making specific
20 reference -- a label of where something fits within a statute
21 is not dispositive as to its operation, and it states the
22 person sought to be admitted for treatment on an involuntary
23 basis, which we would argue assumes emergency admissions as
24 well, and then in (I)(a) it makes specific reference to the
25 involuntary emergency admission process and protective custody

1 under that process. But I would reiterate or maybe point to --
2 I don't know if "reiterate" is the right word -- that I don't
3 think our argument with respect to when a person is admitted to
4 the state mental health system rises and falls by operation of
5 that statute. I believe that there are several other aspects
6 of 135-C that support our conclusion.

7 THE COURT: Okay, I understand that. But just to
8 finish up with this one item --

9 MR. GARLAND: Mm-hmm.

10 THE COURT: -- if your interpretation is correct, that
11 means that somebody who is found to be a danger to him or
12 herself or others is at liberty to go. That simply doesn't
13 make any sense.

14 MR. GARLAND: The distinction I draw, your Honor, is I
15 think there are two or multiple versions of "liberty" or
16 multiple meanings of "liberty" that we may be using. Our
17 argument is that they are at liberty from state custody. They
18 may not be at liberty from custody of a private hospital for
19 other reasons, but the operation of the statute is that they
20 are at liberty from state custody.

21 But, again, I don't think that our reliance on that
22 provision is dispositive of our argument that private hospitals
23 are not part of the state mental health system. The phrase
24 "person to be admitted" is frequently used throughout this
25 code. We've cited a few different instances, there are

1 probably about a dozen, and that almost uniformly, if not
2 uniformly, appears to be referring to admitted to a designated
3 receiving facility. RSA 135-C:28, I states that it would be
4 admitted to the -- excuse me -- the state mental health
5 services system under the supervision of the Commissioner. As
6 your Honor just pointed out, RSA 135-C:3 requires that the
7 Department establish, maintain, implement and coordinate a
8 system of state mental health services which shall be
9 supervised by the Commissioner. And then moving down the
10 statutory code and, in particular 135-C:26, the Commissioner
11 does that or DHHS does that by establishing these receiving
12 facilities, and they are then within the supervision of the
13 Commissioner. And it's not something that he can wave a magic
14 wand and declare. It's something that he has to get express
15 consent from the administrator of the private facility to do.

16 And so, I believe that when you read those together,
17 the plain language and the structure of those provisions
18 contemplate that the state mental health services system within
19 the supervision of the Commissioner is not any private hospital
20 following the point of the completion of the certificate, but,
21 rather, the specific facilities that have been designated as
22 part of that system and by operation of 135-C:26 are within the
23 Commissioner's supervision.

24 THE COURT: So, does the patient's location really
25 matter as to whether the patient is in the system or not under

1 this statute?

2 MR. GARLAND: In terms of location -- in terms of what
3 sort of facility they're at, your Honor?

4 THE COURT: Once the certificate is issued.

5 MR. GARLAND: We believe it does, your Honor.

6 THE COURT: Does the fact that the person happens to
7 be in an emergency room as opposed to a designated facility
8 mean that person isn't in the system yet? You say yes.

9 MR. GARLAND: Yes, your Honor. And, again, the
10 provisions that -- the language and structure that I just
11 pointed out I think support that. I mean, it does contemplate
12 that a person is a person to be admitted, and that's in
13 135-C:29, even when the law enforcement officer takes that
14 person into custody for transportation to a designated
15 receiving facility. That future tense suggests that they are
16 not admitted yet. And the fact that private hospitals are not
17 within the supervision of the Commissioner as the statutory
18 structure lays out for approving designated receiving
19 facilities we think further supports that.

20 THE COURT: Has the State been directing hospitals to
21 complete successive IEA certificates every three days?

22 MR. GARLAND: My understanding, your Honor, of what
23 that's referring to is the State has represented to hospitals
24 that, if they're going to detain people in emergency rooms and
25 still intend to transport them, then it is best practice to

1 complete them, because you don't want to have stale findings of
2 medical conditions. And so, it's not a you must detain them on
3 a certificate. It's that if the desire is still as opposed to
4 treating a person within the private hospital or seeking one of
5 the alternative forms of treatment under 135-C:29(a), if the
6 intent is still to transfer that person to a designated
7 receiving facility, then the certificate needs to be up to
8 date, it can't be stale. And so, I believe that's where that
9 comes from.

10 THE COURT: You don't think that the fact that IEAs
11 are being used excessively is indicative of the fact that the
12 Commissioner acknowledges patients are being held in her
13 custody?

14 MR. GARLAND: I don't think it means that the
15 Commissioner is acknowledging that people -- patients are being
16 held in their custody, because I believe the statutory
17 structure, which I discussed earlier, supports the conclusion
18 that you're not within state custody or at least not admitted
19 to the state mental health services system until you are
20 transferred to a designated receiving facility. I will not
21 dispute, though, your Honor, that the Commissioner is aware
22 that people are being held in private emergency rooms, and
23 that's something that, as the ACLU alleges in its complaint,
24 and I think is fairly common knowledge, this is something that
25 many stakeholders, including the State, have tried to find a

1 solution to, and the State is continuing to try to find a
2 solution to that, along with the same stakeholders. But that
3 does not mean, we believe, particularly given that we believe
4 the statutory language requires the contrary conclusion, that a
5 person is within state custody when they remain within a
6 private emergency room.

7 THE COURT: You would agree, though, that if the
8 statute is interpreted so that a patient is considered to be in
9 the mental health services system once the IEA certificate has
10 issued, then a hearing, probable cause hearing would have to be
11 held within three days?

12 MR. GARLAND: Yes. If they're admitted to the state
13 mental health services system, your Honor, we do agree with
14 that. Our dispute, and I think you've hit on the crux of it,
15 is that we don't believe -- and we believe, rather, that the
16 statute rather unambiguously dictates that a person is not
17 within that system until they're admitted to a DRF. But if you
18 were to interpret it in a contrary manner, or if you were to
19 certify questions and the New Hampshire Supreme Court were to
20 interpret it in a contrary manner, we do agree that a due
21 process hearing would then be required.

22 THE COURT: The way the system is operating now, once
23 the person is assigned and admitted to a designated facility
24 there is a probable cause hearing within three days of
25 admission?

1 MR. GARLAND: Yes, your Honor. I don't think anybody
2 -- I won't speak for the plaintiffs or the hospitals, but, yes,
3 that's our understanding. And I don't think they're alleging
4 otherwise.

5 THE COURT: And what are the mechanics of setting up
6 that probable cause hearing? Who notifies the court? Whose
7 responsibility is it to notify the court that this hearing must
8 be scheduled?

9 MR. GARLAND: Your Honor, that's something that I
10 don't know off the top of my head, and maybe one of the other
11 counsel will know. But I'm not sure specifically. I do know
12 that the Court isn't notified until I believe a person is at a
13 designated receiving facility. I suspect it's a designated
14 receiving facility, but I'm not certain of that, so I don't
15 want to make a misrepresentation.

16 THE COURT: I notice that the involuntary admission
17 certificate that was provided as Exhibit A to one of the
18 filings, the very first page the title is the State of New
19 Hampshire Judicial Branch.

20 MR. GARLAND: Excuse me, your Honor. I'm pulling it
21 up. Yes, your Honor.

22 THE COURT: All right. You're familiar, of course,
23 with Judge McNamara's decision from the Merrimack County
24 Superior Court?

25 MR. GARLAND: I am, your Honor, and I think we put

1 this into our briefing, but if we did not our position with
2 respect to that is the State wasn't a party, state action
3 wasn't raised in that case, and we do think that his conclusion
4 that a person is admitted upon completion of the certificate is
5 incorrect for the reasons that we've set forth and the reasons
6 I've said today.

7 THE COURT: All right. Go ahead. I've been
8 interrupting you.

9 MR. GARLAND: That's okay. You've followed my -- the
10 procession of my notes remarkably well, so I appreciate that.

11 Another point that I would like to make about the
12 timing of everything, because I do think that is another issue
13 that's central to the case, is that both the plaintiffs and the
14 hospitals argue that a person must be, upon completion of a
15 certificate, immediately taken into custody and then
16 transported, and I don't believe that RSA 135-C:29 supports
17 that reading. The adverb "immediately" in that sentence
18 appears to -- it doesn't appear to -- it does modify the act of
19 transporting somebody once they're in custody. There's no
20 similar modifier for the act of taking somebody into custody
21 within C:29 or within any other provision that I've been able
22 to find. The legislature knew how to and has demonstrated
23 throughout this particular chapter that it knew when it wanted
24 to emphasize that something had to be done within a specific
25 time frame or as expeditiously as possible that that happen.

1 It requires due process hearings within three days of
2 admission. We say admission to a designated receiving
3 facility. It says transport immediately once taken into
4 custody. There are time frames that are set out for protective
5 custody that don't really apply in this case, but when a person
6 is in state custody when certain things must happen, and that's
7 down to the hour. And the legislature did not use a similar
8 modifier with respect to the act of taking someone into custody
9 upon completion of a certificate and then transporting that
10 person to a designated receiving facility. And furthermore,
11 the legislature, we believe, was aware that a period of time
12 and expressly contemplated that a period of time could exist
13 between those two acts, the completion of the certificate and
14 the act of taking someone into custody. C:29(a), I and II both
15 suggest that a certificate can be rescinded if certain
16 conditions are met and shall be rescinded if a patient no
17 longer meets the criteria of C:27. And the specific ways that
18 something can be rescinded contemplates a period of time
19 developing where a person either is no longer showing symptoms
20 or a person can be transferred to somewhere else in the
21 community.

22 In addition to that, RSA 135-C:13 makes clear that
23 admissions to the state mental health services system and
24 access to treatments or other services within the system is
25 contingent upon availability of appropriations. I mean, they

1 specifically said that in there. And so, it appears the
2 legislature did contemplate that you may be eligible, as the
3 statute uses it in C:27, for an admission to a state facility
4 or a designated receiving facility, but you may not be able to
5 get there. It is as appropriations allow.

6 And I would note, your Honor, that neither the
7 plaintiffs nor the hospitals are challenging the
8 constitutionality of the statute itself. They are reading the
9 statute in way that is contrary to how we read it and saying it
10 imposes obligations on the Commissioner that the Commissioner
11 is not complying with that both violate the federal and state
12 Constitution and then also violate the plain language of the
13 statute. They're not saying the statutory structure itself is
14 unconstitutional. I think that would be a fundamentally
15 different case, and it's not the case you're presented with.

16 And so, we believe that these time frames that are set
17 forth where this legislature is specifically contemplating
18 periods of time passing is recognizing that appropriations may
19 not be sufficient to accommodate all people in the mental
20 health system supports our reading that the legislature chose
21 not to put a specific time frame on the transport of someone to
22 a designated receiving facility.

23 THE COURT: If you interpret the statute as admitting
24 a patient to the system when the certificate is issued, then
25 you don't need a strained interpretation of transporting the

1 person to a designated facility. You're sort of straining the
2 interpretation of that to fit what's going on now.

3 MR. GARLAND: I would quibble, your Honor, with
4 "straining the interpretation." Obviously, we think that we're
5 interpreting the language and the structure as it's set forth.
6 And I would just again reiterate that our reading of the
7 statute and as it works kind of as a cohesive whole is that a
8 state mental health system within the supervision of the
9 Commissioner, that that last clause there has meaning. It is
10 not any hospital; it has to be a hospital that's providing
11 services that are within the Commissioner's supervision. And
12 the statute lays out a process for that, and the process that
13 it lays out is either you are a New Hampshire Hospital or you
14 become a designated receiving facility, and you have to consent
15 to do that, and if you do not become a designated receiving
16 facility, if you're not consenting to being part of the state
17 mental health services system, you are not part of it.

18 And so, I don't believe, your Honor, respectfully,
19 that that's a strained reading, but I do appreciate your point,
20 which is that, if the reading that you just proposed is the
21 correct reading, then the due process hearing would be
22 required, and I don't think we're disputing that.

23 THE COURT: All right. Did you have anything further?

24 MR. GARLAND: I don't think so, your Honor. And I
25 wasn't planning, unless you had questions, on touching upon the

1 other allegations of state action. I mean, I do think that
2 your focus is the same as the focus I intended, and so, unless
3 you have other questions, that's all I have to say about that
4 now.

5 THE COURT: Thank you.

6 MR. GARLAND: Thank you.

7 THE COURT: Mr. Curtis.

8 MR. CURTIS: Yes. Thank you, your Honor. And just to
9 give you a little preface here, we would like to split our time
10 today between myself and Mr. McGrath. I will address the
11 constitutional claims that we've alleged under Counts One and
12 Two of our complaint, and then Mr. McGrath will focus on Count
13 Three, which is our statutory claim under the IEA statute. And
14 we would submit that the timing required under the statute is
15 really only directly applicable to that third count, because
16 we, as I'll explain in a moment, believe that our
17 constitutional claims should survive regardless of when a due
18 process hearing is required under the State IEA statute, your
19 Honor.

20 So, just to begin, I'd like to sort of build out that
21 point a little bit more and explain that we're taking the
22 position that the State is still violating the Constitution and
23 engaging in direct action in this case by doing a couple of
24 things, and the first is they're telling hospitals that they
25 need to detain patients and renew their IEA certificates every

1 three days and then, once they've done that, they're
2 withholding due process from those patients while they're held
3 in the emergency rooms.

4 And another key point I'd like to emphasize that's
5 related to that is that we have chosen to sue the State here,
6 not the hospitals, and so all of the cases and all of the
7 theories that the State has been trying to put forward about
8 how this case is just about the hospitals' actions are really
9 not all that pertinent here, because our claims are against the
10 State, and we're suing them for acting in a way that is
11 violating people's constitutional rights in connection with
12 involuntary emergency admission of those patients.

13 THE COURT: When you say "state," you really mean the
14 Commissioner in her individual capacity?

15 MR. CURTIS: In her official capacity, your Honor.

16 THE COURT: In her official capacity. All right.

17 MR. CURTIS: Yes.

18 THE COURT: I know all of us sort of go back and forth
19 between State Department and Commissioner. She's the real
20 party here, correct, the correct party?

21 MR. CURTIS: That is correct, yes. And we think
22 Monell makes that clear, that you can sue a state official in
23 her official capacity as a representative of a department or a
24 governing organization within the government, and so we have
25 sued Commissioner --

1 THE COURT: Let me just ask you about that Monell
2 comment a minute. We won't dwell on it too long.

3 MR. CURTIS: Okay.

4 THE COURT: But as I understood -- you mention this in
5 your surreply, and, as I understand it, Monell applies to 1983
6 claims brought against municipalities and other local
7 governmental units, and so I don't quite understand how you're
8 making that case applicable to the Commissioner in this case.

9 MR. CURTIS: Yes, your Honor. So, our understanding
10 is that governments and their officials, as the First Circuit
11 has explained and as a couple of other cases have applied, I
12 believe, to state governing bodies as well, that those
13 governing bodies and various departments can be sued pursuant
14 to Monell when they have engaged in official policy or custom
15 or practice that is violating people's constitutional rights.

16 THE COURT: All right. I'll look at that further.

17 MR. CURTIS: Yeah. And we're happy, if it's helpful,
18 to submit additional information on that, your Honor, if that
19 would be helpful, given that we didn't have a ton of space to
20 go into a great deal of depth on that issue in our previous
21 briefing.

22 THE COURT: Yes, why don't you do that.

23 MR. CURTIS: Okay, we'll do that. So, returning to
24 the issues at hand here, we have, as I said, alleged claims
25 against the State for their actions in response to what has

1 developed as sort of a bordering crisis in the State of New
2 Hampshire, and what we would submit is that, whatever the
3 Constitution requires, a person certainly can't be
4 involuntarily detained without due process for 27 days or 20
5 days or 15 days or even 5 days without some sort of safeguards
6 to ensure that they are receiving some protections and due
7 process to ensure that they are being detained properly.

8 The State has created the statutory scheme here which
9 has led hospitals to complete IEA certificates and hold
10 patients, and the State is then supposed to deliver patients to
11 DRFs and provide probable cause hearings. But instead of doing
12 that, the State has chosen not to deliver patients to DRFs and
13 has chosen not to provide hearings, and, instead, the state is
14 telling the hospitals that they should detain these patients
15 and renew their IEA certificates every three days on this
16 theory that that somehow allows the hospitals to continue
17 holding people for indefinite periods of time while the State
18 is supposed to be taking action and is supposed to be providing
19 due process to those people. Those directions from the State
20 are clearly state action, and I think my colleague, Mr.
21 Garland, acknowledged earlier that the state has told hospitals
22 that it's best practice to do that and to continue to renew
23 those IEA certificates every three days.

24 THE COURT: So, you contend that, once the certificate
25 is issued, then the Commissioner has the responsibility of

1 seeing that a probable cause hearing is held within three days?

2 MR. CURTIS: That is our position, your Honor, but
3 even if the hearing doesn't need to occur within three days, we
4 still submit that the Commissioner has an obligation to act at
5 that time. It's supposed to either provide a due process
6 hearing within three days of that certificate being completed,
7 or it's supposed to transfer the person to a DRF and provide
8 the due process hearing there, and the Commissioner has chosen
9 just to not do any of those things and just sit on their hands
10 until beds become available in DRFs and deny people any kind of
11 due process in the interim.

12 THE COURT: Do you know from the -- you may not know
13 this, but from the history of this -- of the application of
14 this statute going back years and years after it was first
15 enacted, do you know was this procedure followed on a regular
16 basis before the numbers became so great that these
17 difficulties arose?

18 MR. CURTIS: Yes. It's my understanding, your Honor,
19 and I believe we've alleged in our complaint that prior to the
20 recent five to ten years or -- I'm not sure exactly how long
21 it's been lasting that this crisis has been going on -- but my
22 understanding is that prior to that the State was immediately
23 transferring people from the emergency rooms to the DRFs or New
24 Hampshire Hospital where they were receiving due process
25 hearings within about three days of their IEA certificate being

1 completed. So, that is, I believe, how the legislature thought
2 it would function and how they have always understood this
3 process as working, and I think there are pretty clear
4 indicators from the legislative history that suggests that that
5 is how they've always viewed the statute and how they thought
6 it would occur. But, as you say, in recent years that process
7 has deteriorated as DRF beds have become fewer and further
8 between, and the problem has emerged that there isn't space to
9 transfer people, and so, as a result, the State has just chosen
10 not to transfer them at all and to simply deny any kind of due
11 process while they're waiting for a transfer to a DRF facility.

12 And, as I said, you know, all of the hospitals are
13 doing this, are engaged in this practice of renewing the IEA
14 certificates every three days. It's pretty consistent across
15 the board, which is one reason that we believe that the State
16 has directed hospitals to do that; and, you know, we need
17 further discovery to further understand all of the dynamics of
18 what has been going on here and what kind of direction has been
19 occurring.

20 But at the 12(b)(6) stage we believe that our
21 allegations are sufficient here, that we've clearly alleged
22 that the State is telling these hospitals to do this and to
23 engage in this practice, and that in and of itself, regardless
24 of what the statute requires, is state action, and, therefore,
25 the idea that this is just about the hospitals' actions and

1 doesn't involve any action by the State is not accurate and not
2 correct here, your Honor.

3 THE COURT: Are you aware of whether under New
4 Hampshire law a local hospital or its personnel are permitted
5 to refuse to examine or evaluate a person in a hospital
6 emergency room who is experiencing or appears to be
7 experiencing a mental health crisis? Are you aware of any?

8 MR. CURTIS: We are not aware of any provision that
9 would allow them to refuse care, and we didn't really focus on
10 this issue in our briefs, but I believe that the intervenor
11 hospitals have emphasized that there is this provision
12 151:2(g), which, exactly to the contrary, tells them that they
13 need to accept patients who come into their emergency rooms for
14 care and that they are required to provide emergency services.
15 So, we would agree with the hospitals that they are required to
16 act in these circumstances and that they are required to take
17 these patients in, and that just sort of plays into the State
18 statutory scheme where they've created a system whereby the
19 hospitals are actually the beginning of the process, and that's
20 what their -- DHHS's website says. It says that hospitals are
21 where patients should go and where law enforcement should take
22 people when they believe that they are a threat to themselves
23 or others, and that is exactly what's happening.

24 So, the State is directing people to go to the
25 emergency rooms where that process will begin, and then the

1 hospital completes the IEA certificate, and they exercise their
2 professional judgment in doing that, but if they believe that
3 this person is a threat to themselves or others, the statute
4 clearly suggests that they should complete the IEA certificate
5 and begin the process of having this person be involuntarily
6 detained, and that's what's happening here.

7 And so, we think that both the statutory scheme and
8 the directions that have been given by the State, by DHHS
9 themselves, are leading to these patients being involuntarily
10 detained in hospitals and in emergency rooms while they're
11 waiting to be transferred to DRFs, and that the State has an on
12 obligation to provide due process to them.

13 I mean, in one of the sort of seminal cases that
14 Estades-Negroni, Rockwell and Trimble all rely on, Spencer,
15 Judge Posner himself actually noted that this was an issue and
16 a very similar situation. In Spencer the Court ended up
17 holding that the hospital's actions were not attributable to
18 the State, but even there Judge Posner noted that it would be,
19 quote, monstrous for states to allow family members, physicians
20 and other private persons, I think he was referring to, or
21 suggesting hospitals there, to exercise their commitment powers
22 without some sort of safeguards, including a due process
23 hearing in a timely manner. And so, I don't think there's
24 really any question here that there is a liberty interest at
25 stake here, and Rockwell and Estades-Negroni all acknowledge

1 that.

2 But for some reason the State thinks that, even though
3 there is a liberty interest here, they don't need to act
4 because they have been relying on private hospitals to act as
5 involuntary detention centers while they wait to transfer these
6 people to DRF facilities -- DRFs. And as I mentioned a little
7 earlier, we would suggest that that is a policy and practice of
8 withholding due process from people for indefinite periods of
9 time and depriving them of their counsel during that time, and
10 we think that that constitutes a viable Section 1983 claim, and
11 that those acts and omissions are clearly direct action by the
12 State, which is really the only defense that the state has
13 raised here or that DHHS has raised here. They have argued
14 that they are not acting and not doing anything, and so,
15 therefore, we don't have a viable 1983 claim.

16 And just to sort of emphasize the point as well about
17 how we have -- we've sued the State, not the hospitals, and, as
18 I mentioned before, all of the cases that DHHS has cited here
19 were cases against hospitals, and ours is about the State's
20 actions or DHHS's actions as opposed to the hospitals' actions.
21 And to that point we also think that the cases that they've
22 relied on are distinguishable on the facts, because the State
23 here or DHHS here is deeply involved in every step of the
24 process. They have directed hospitals to detain patients and
25 renew their IEA certificates every three days.

1 As I mentioned before, the process begins in the ERs.
2 Their website says that, and the statute also suggests that.
3 It instructs physicians and APRNs to carry out the mental
4 health examinations and complete these certificates, and the
5 State prepares and publishes the forms that are used in the
6 process. The statute says that when law enforcement takes a
7 person believed to be suffering from a mental illness into
8 protective custody, law enforcement should transport that
9 person directly to an emergency room of a licensed general
10 hospital. So, it's clearly telling law enforcement to continue
11 engaging in this process of taking people to emergency rooms
12 and beginning the process there. A justice of the peace can
13 order a law enforcement officer to take someone into custody
14 and deliver them to an emergency room, where they'll oversee
15 the compulsory mental health examination. And, as I mentioned
16 before, by refusing to transfer patients out of the emergency
17 rooms we think that the State or DHHS is effectively treating
18 these hospital emergency rooms as involuntary detention
19 centers.

20 So, for all of those reasons we think that our federal
21 and state constitutional claims should survive, regardless of
22 what timing is required under the statute and regardless of
23 whether that three days is triggered from the IEA certificate
24 or from the transfer to the DRF.

25 But unless you have any further questions about that,

1 I'd like to reserve a little bit of time for Mr. McGrath to
2 talk more about that timing, because I think that is fairly
3 critical to our state statutory claims and is important to, you
4 know, maintain those claims in this case as well.

5 THE COURT: Certainly.

6 Mr. McGrath.

7 MR. McGRATH: Good morning, your Honor. It's clear to
8 us that the purpose of C:31 of the statute is to protect a
9 person's liberty interests. The legislature recognized that
10 when a person is held involuntarily for purposes of involuntary
11 emergency admission, that that is a serious curtailment of
12 their liberty, and that cannot be effectuated by the State
13 without some amount of due process. The State made it clear in
14 C:31 that a hearing must be provided within three days of when
15 an involuntary emergency admission occurs. It's entirely
16 unreasonable to interpret the statute to suggest that an
17 involuntary emergency admission does not occur upon completion
18 of an IEA certificate. When the certificate is completed the
19 person is not free to leave. That's how the legislature
20 understood this statute to operate, and for that reason it's
21 critical that the hearing be provided within three days of when
22 the certificate issues. This means that the term "involuntary
23 emergency admission" has to be interpreted to mean an admission
24 upon the completion of the IEA certificate.

25 Now, the State has sort of dug into the weeds of

1 various provisions of the statute and looked for hints in the
2 text to suggest that perhaps an admission doesn't happen until
3 a person is transferred to the DRF, but that's, as your Honor
4 observed, a somewhat strained way of reading the statute. And
5 so, I think it would be helpful to just sort of focus on a
6 couple of the points that have been raised that are these sort
7 of suggestive hints at why a transfer doesn't happen until or
8 admission doesn't happen until there's been a transfer to the
9 DRF.

10 One of the first -- or one of the points that the
11 State relies on is the period of time that is hinted at in
12 C:29-A, and C:29-A is not a provision about the due process
13 hearing that's required under the statute. This is about how
14 the State contemplates the, you know, basically this brief gap
15 in time between when the certificate is issued and when a
16 person is taken into custody. All that statute, that that
17 provision contemplates is that a police officer, a law
18 enforcement officer wasn't in the hospital emergency room at
19 the time that the certificate was issued and contemplates the
20 possibility that before the law enforcement officer appears
21 that the need for an admission or transfer to a DRF is no
22 longer present, and so it obviates the need to unnecessarily
23 transfer a person to a DRF if the issues that gave rise to the
24 need for involuntary admission have subsided.

25 The State also points to the language in C:28, where

1 the statute references involuntary emergency admission shall be
2 to the state mental health services system. Nowhere does the
3 statute define the term "state health services system." The
4 state points to C:23 and C:26 and says that somehow those
5 provisions mean that the state mental health services system
6 only encompasses designated receiving facilities and New
7 Hampshire Hospital. But that's not what this provision's
8 saying. C:23 merely defines the term designated -- or it only
9 -- it doesn't even -- you know, nowhere does it include a
10 definition for state mental health services system, and it only
11 says that the system shall be established, and then C:26 merely
12 states that the Commissioner may designate a facility as a
13 designated receiving facility. There's no language there that
14 narrows the scope of what the state mental health services
15 system is.

16 Next, the State suggests that our interpretation of
17 the immediate transfer provision in C:29 is incorrect. Now,
18 C:29 reads that, Upon completion of an involuntary emergency
19 admission certificate a law enforcement officer shall take
20 custody of a person to be admitted and shall immediately
21 deliver such person to a receiving facility. That language
22 does not contemplate any gap in time between when the
23 certificate is issued and when the transfer occurs. The fact
24 that the word "immediately" modifies the word "shall deliver"
25 or the phrase "shall deliver" does not mean that the person is

1 not required to be immediately taken into custody. The word
2 "upon" used at the very beginning of that sentence means
3 immediately following or at the occurrence of, and so the
4 language upon completion of the IEA certificate the law
5 enforcement officer shall take custody of the person means that
6 when the certificate issues there is no gap in time -- no
7 significant gap in time and certainly not several days
8 contemplated by the IEA statute. The admission happens
9 immediately. The person is not free to leave because, as the
10 legislature drafted this, the lawmakers contemplated that a
11 person is taken into custody right as the certificate is
12 issued.

13 THE COURT: Now, I suppose what that's intended to do
14 is to make it clear that, when the officer comes to the
15 emergency room and takes custody of this person, that the
16 person is to be immediately delivered to the facility and not
17 be taken down to the police station or somewhere else. This is
18 a transfer from the emergency room to the designated facility.

19 MR. McGRATH: Precisely.

20 THE COURT: And that's all that's supposed to be done
21 here.

22 MR. McGRATH: That's correct. But it also suggests
23 that the person is taken into custody immediately when the
24 certificate is issued.

25 THE COURT: That's right.

1 MR. McGRATH: And what this suggests is the
2 legislature understood that, when a certificate is issued, a
3 person is no longer at liberty, and what C:31 is concerned with
4 is ensuring that there's a due process hearing provided within
5 three days of when a person is no longer free to leave. The
6 person's liberty has been curtailed, and it is critical that a
7 hearing is provided within three days of when that occurs.
8 When the legislature drafted this statute this sort of
9 indefinite period of time in which a person is held in a
10 hospital emergency room against their will was not something
11 that the law makers contemplated, and so, what is happening is
12 there's sort of this artificial scenario where people are being
13 deprived of their statutory rights simply because the lawmakers
14 did not expressly make clear that if you're in a hospital
15 emergency room that right is triggered by the statute as well.
16 But it's clear that the statute really isn't concerned with
17 where you're at. You could be in a hospital emergency room,
18 you could be in a DRF, but if you're not free to leave and
19 you're being held pursuant to a certificate that statutory
20 right has been triggered.

21 THE COURT: My earlier question asked that. Why does
22 it make a difference where the person is if the person is in
23 custody?

24 MR. McGRATH: Precisely.

25 THE COURT: That's the operative status here, is

1 custody, loss of freedom.

2 MR. McGRATH: That's exactly right, and we believe
3 that that is what animates the statute and requires the
4 hearing.

5 One other point to note, and it's a minor one, but the
6 State has emphasized a couple of times that the phrase "person
7 to be admitted" is used in a prospective way, and so it
8 suggests that when the certificate issues the person is only
9 later going to be admitted, but the statute really, it can't be
10 read that way. The term "person to be admitted" is sort of a
11 term of art that's used throughout the statute to describe the
12 person who is being brought into the involuntary emergency
13 admissions process. And because it's used this way the statute
14 actually uses the term "person admitted" in that same context
15 where it actually contemplates that the person has already been
16 brought to the designated receiving facility.

17 So, Section C:31, Paragraph II, for example, this is
18 discussing the rights and responsibilities -- the emergency
19 admission hearing process, and, for example, Part II says the
20 person sought to be admitted or the petitioner may request a
21 continuance of the probable cause hearing. Well, if the
22 probable cause hearing is being requested to be continued,
23 clearly the right to the hearing already exists, and so if the
24 person to be admitted is asking for a continuance of a hearing
25 and they already have that right, it's just unreasonable to

1 suggest that, well, if the term "person to be admitted" appears
2 elsewhere in the statute it only means that the person has not
3 yet been admitted. Clearly, the person has already been
4 admitted in C:31, Part II, and yet that term is being used. It
5 shows that as a term of art. It's so that the legislature is
6 identifying the individual who is being brought into the
7 services system, and they are consistent throughout the statute
8 in that usage. So, to suggest that that means or somehow
9 indicates that the legislature anticipates that admission does
10 not happen until transfer to a DRF is just plainly wrong.

11 I'll just review my notes to see if there's anything
12 left to say, but I think that really covers what I wanted to
13 address.

14 We would just add that the statute is clear, and so to
15 the extent -- there really is no -- there is no need to sort of
16 dig into the legislative history, because it is abundantly
17 apparent from the language of the statute that the hearing
18 right is triggered upon the IEA certificate, but the
19 legislative history also reinforces our position. The
20 legislature is clear, was clear, the lawmakers were clear when
21 particularly, for example, in 1997, when the legislature was
22 expanding the categories for possible admission, that the
23 hearing is critical to protecting individuals' rights, and if a
24 person is no longer at liberty, a hearing is required within
25 three days. This is something that was emphasized, something

1 that made the expanded categories of admission tolerable to the
2 State legislature.

3 And, as a final note, if the State's interpretation
4 were to prevail, it would really render this statute
5 unconstitutional. It would be contemplating a deprivation of
6 liberty without due process within a reasonable period of time
7 when a person is brought into custody pursuant to the State
8 authority. And so, we would submit that, to the extent the
9 Court finds any ambiguity in any of the statutory language
10 here, which we think there is not, those provisions should be
11 construed in a way that avoids any sort of constitutional
12 violation to avoid a constitutional conflict here. And with
13 that, I'll end my remarks.

14 THE COURT: In terms of legislative history, it was in
15 2017, wasn't it, that the legislature established a commission
16 to try to address this issue? Was it 2017?

17 MR. McGRATH: I believe that's right. If not, it was
18 2018. I think it was 2017, yeah.

19 THE COURT: All right. Thank you very much,
20 Mr. McGrath.

21 MR. McGRATH: Thank you, your Honor.

22 THE COURT: Mr. Ramsdell.

23 MR. RAMSDELL: Thank you, your Honor. First, I'll say
24 that we agree with the statutory interpretation offered by the
25 plaintiffs in this case, and I won't reiterate how we interpret

1 the statutes differently than the State has offered to you,
2 because I think that plaintiffs have done a very good job
3 explaining that. Instead, I'll be brief, but I'm just going to
4 try and fill in a couple of blanks about how state action
5 actually pervades the involuntary emergency admission process.
6 As mentioned earlier, although I don't think quite
7 specifically, it really starts with it is the Commissioner of
8 DHHS whose responsibility it is to maintain a list of qualified
9 medical professionals who may order an IEA certificate. As the
10 Court noted in its questions to the State, DHHS literally sends
11 people to hospital EDs, not to New Hampshire Hospital or not to
12 a DRF but to hospital EDs to commence the IEA process, and
13 there it's not a purely voluntary act on -- it is medical
14 judgment goes into whether the IEA certificate is warranted,
15 but neither the hospital nor the physician has a purely
16 voluntary choice whether to examine someone for whether an IEA
17 certificate is warranted. Hospitals, unlike the New Hampshire
18 Hospital, are required to operate emergency departments and
19 provide emergency services 24 hours a day, and that's by state
20 statute, RSA 151:2-g. It's actually a condition of the
21 hospital's license. So, they couldn't possibly turn the person
22 away.

23 Then you have to look at the administrative code
24 regarding the physicians also. As we pointed out in our
25 surreply, part of the administrative code requirements is that

1 physicians follow the American Medical Association Code of
2 Ethics. That Code of Ethics makes it -- the physician's
3 responsibility to the patient is his paramount concern, and so
4 the physician could not possibly examine someone, find that
5 they were a danger to himself or herself or to others, and then
6 not complete the IEA certificate. That's what the system is
7 designed for. That's what the physician is obligated to do
8 both by state statute and by the administrative code. And so,
9 the screening process itself involves state action, and it
10 doesn't -- once the certificate is signed, the State action is
11 even more obvious and continues.

12 As the Court has pointed out, the patient is admitted
13 to the state mental health system by statute. The patient is
14 to be transported from the hospital ED to a DRF immediately,
15 but DHHS completely controls whether the patient actually is
16 transported to a DRF or to New Hampshire Hospital, and while
17 that patient remains at a hospital ED the hospital staff, the
18 physician, is required every three days to complete a new
19 medical evaluation. And there seems to be some confusion here
20 between the State's allegations or response in its memo of law
21 and what we may have heard this morning. The State suggested
22 in its pleadings that that statement, that allegation the Court
23 should not accept as true because we offered that that's from
24 the DHHS website, when, in fact, it doesn't appear there. I
25 direct the Court to paragraph 40 of our amended complaint. We

1 do not allege that that statement appears on the DHHS website
2 at all. It is a specific allegation of fact, and I will advise
3 the Court it is based on information received directly from
4 DHHS by the hospitals.

5 As was suggested this morning, the DHHS provides
6 training to New Hampshire Hospitals, and I can tell you that
7 that allegation and statement comes directly from a New
8 Hampshire Hospital admissions training presentation that was
9 put together and offered not long before this lawsuit was
10 filed, and under the heading of IEA best practices a/k/a dos,
11 it states, and I quote, Make sure pages 5, 6, and 7 are
12 re-executed every three days for patients holding in the ER at
13 chronological numbers to the added pages 8, 9, 10, 11, 12, 13,
14 et cetera. That comes directly from the training manual. And
15 the purpose for that is, your Honor, both the statute, RSA
16 135-C:28, I and the IEA certificate itself require that an
17 examination is performed within three days of the date of the
18 petition being filed to the Court. And so, by directing the
19 hospitals to have their physicians perform the evaluation every
20 three days, New Hampshire Hospital or the DRF doesn't have to
21 perform another evaluation in order to file the petition with
22 the Circuit Court, it's already been done by the hospital at
23 the direction of New Hampshire Hospital.

24 We've, I believe, set forth our arguments in our
25 pleadings. I also think that the statutes have already been

1 explained to you in a very similar manner to the way we would
2 by plaintiffs, and so if the Court has any questions I'll be
3 happy to try and respond to those, but otherwise I don't know
4 what else I would offer the Court that wouldn't be somewhat
5 redundant.

6 THE COURT: The Commissioner in her memo says if the
7 private hospital does not want to hold the patient it does not
8 need to complete an IEA petition or certificate in the first
9 instance. That seems to fly in the face of statutes and
10 ethics, does it not?

11 MR. RAMSDELL: It is simply wrong for the reasons I
12 said, both RSA 151:2-g and the administrative code as well as
13 the American Medical Association Code of Ethics. It is simply
14 not -- it could not be -- it's also a matter of common sense,
15 if we're going to be real candid about it, that a physician
16 can't look at someone who has arrived at a hospital emergency
17 room and say, You know what? You seem to be a danger to
18 yourself or to someone else. Have a nice day. You're correct,
19 your Honor.

20 THE COURT: Now, healthcare providers are provided
21 with certain immunity, as we know, in Section 329-B of our
22 statute, psychologists, physicians and surgeons, mental health
23 practice, alcohol and drug use professionals, and those
24 provisions are all the same. And essentially they say, Any
25 person licensed under this chapter has a duty to warn of or

1 take reasonable precautions to provide protection from a client
2 or patient's violent behavior when the client or patient has
3 communicated to such licensee a serious threat of physical
4 violence against a clearly identified or reasonably
5 identifiable victim or victims or a serious threat of
6 substantial damage to real property.

7 And then it says, The duty to warn may be discharged,
8 and no monetary liability shall arise in certain circumstances
9 if the licensee makes reasonable efforts to communicate the
10 threat to the victim or victims, notifies the Police Department
11 closest to the client's patients or potential victim's
12 residence, or obtains civil commitment of the client or patient
13 to the state mental health system.

14 So, when a doctor or healthcare professional makes the
15 determination that an IEA must issue, they are really following
16 this other statute also --

17 MR. RAMSDELL: That would be correct, your Honor.

18 THE COURT: -- in the best interests of the patient
19 and of the public.

20 MR. RAMSDELL: That is correct.

21 THE COURT: All right. Thank you, Mr. Ramsdell.

22 MR. RAMSDELL: Thank you, your Honor.

23 THE COURT: Mr. Garland, would you like a brief
24 rebuttal?

25 MR. GARLAND: Very brief, your Honor. So, with

1 respect to kind of the line of questions that you asked and the
2 argument as to whether a hospital is obligated to hold somebody
3 who presents with mental health symptoms, we have not disputed
4 and we're not suggesting that a hospital may not be under an
5 obligation to hold somebody. The question is whether they are
6 in state custody for the purposes of 135-C, and we believe that
7 the plain language and structure of that statute do not put a
8 person within state custody in that this is still a voluntary
9 and discretionary decision. And I do believe that the indirect
10 state action cases that we've cited fully support that. What
11 the hospitals are not saying and what they're not explaining is
12 why, if a doctor is under some obligation to invoke this
13 statute, and we don't think that the statutory language
14 requires that, and their failure to do so would somehow -- or,
15 rather, that their action is compelled by this statute, and we
16 don't think it is -- how they are not also a state actor under
17 one of the indirect theories. And the reason for that is
18 because the First Circuit has repeatedly recognized and Judge
19 McAuliffe repeatedly recognized that these are voluntary
20 actions, that there is some amount of discretion and
21 voluntariness to this, and RSA 135-C embraces that. It is not
22 the only way a hospital can address the situation, and it does
23 not impose any requirement. It may impose best practices, it
24 may impose an avenue through which a hospital, based on its
25 economic or its concerns about litigation or its prudential

1 concerns or its EMTALA law obligations or its common-law
2 duties, may say this is the path of least resistance or this is
3 even the appropriate path, but the statute does not say this is
4 the only path, this is the required path, You have to do this,
5 Hospital.

6 And I think that's the point we're trying to make, is
7 that that sort of voluntariness, it may not be voluntary in the
8 most abstract sense, because it may not mean that a hospital
9 can make any choice that it wants to and simply release
10 somebody, but the statute does not require that they go through
11 this particular process. And so, I just wanted to clarify that
12 point.

13 And then the two other very brief points, briefer than
14 that, and this obviously is not -- this is something that we
15 are all aware of, but when interpreting the statute we have to
16 start with the text and the structure, and we believe that most
17 of the arguments that you're hearing today are arguments as to
18 what the plaintiffs and what the hospitals wish the statute
19 did. They wish the statute, because there is clearly, it is
20 not operating at maximum efficiency, they wish this statute had
21 certain requirements. We do not believe it does, and they have
22 not challenged the statute itself, and I think that's an
23 important distinction. They're not saying the way the statute
24 is operating violates the Constitution. They're saying this
25 statute imposes certain requirements on the State and the State

1 is not filling those, and we simply don't think it does.

2 And then the third point, and it's a related point I'd
3 make with respect to that, is that we obviously believe that
4 the statute is unambiguous as well, and the plaintiffs have
5 made an argument and the hospitals have made an argument that
6 it's unambiguous in the other direction. If your Honor thinks
7 there's some ambiguity, or if there is some question as to how
8 a particular provision operates, the answer isn't for you, I
9 don't believe, respectfully, your Honor, to invoke the doctrine
10 of constitutional avoidance. I think the answer is to send
11 that question to the New Hampshire Supreme Court. Judge
12 Laplante recently did this in the Caroline Casey voting case,
13 and he recognized that the New Hampshire Supreme Court has all
14 of the tools that the Federal Court has, but also the Court has
15 jurisdiction within the State, and so we don't think that's
16 necessary, and I'm certainly not advocating for that. We
17 believe our reading is correct, we believe our reading is
18 unambiguous that is based on unambiguous text and structure,
19 but the answer isn't for you, your Honor, to read a statute if
20 it is ambiguous in a way that avoids the constitutional
21 question. It would be to ask the Supreme Court to resolve any
22 sort of ambiguities.

23 THE COURT: Have you discussed this with other
24 counsel, about the possibility of certifying questions?

25 MR. GARLAND: In terms of opposing counsel, your

1 Honor?

2 THE COURT: Yes.

3 MR. GARLAND: We haven't discussed it. I recall,
4 though it was probably last fall when we had a conference with
5 you, that you did raise the prospect, and we are not advocating
6 for it. I want to make that abundantly clear. We don't think
7 it's necessary. We think the statute is unambiguous, but we do
8 think that, to the extent there is an ambiguity, it's something
9 that would be best for the Supreme Court to resolve.

10 THE COURT: Well, will counsel please discuss that
11 together, the possibility of certification to the New Hampshire
12 Supreme Court, and then what we will do is schedule a
13 teleconference in the next week or two to discuss that. But
14 I'd like counsel to discuss it among themselves, first of all.

15 MR. CURTIS: Your Honor, if I may?

16 THE COURT: Yes.

17 MR. CURTIS: If I may, your Honor, we're happy to
18 speak with defense counsel about that and get back to you on
19 our position after we've had that conversation, but I would
20 just note that the plaintiffs also do not advocate for
21 certification to the State Supreme Court, and we think that, as
22 I mentioned before, even certifying the question to the State
23 Supreme Court wouldn't actually resolve all of the issues here,
24 because if the statute is not being -- if we have not
25 interpreted the statute correctly, and if the State is right in

1 their interpretation of the statute, we would submit that there
2 is still a requirement that the State provide timely due
3 process when people are being involuntarily detained, and so
4 just saying that they need to do that within three days of
5 transferring someone to a DRF under the statute doesn't solve
6 that constitutional problem and doesn't solve the problem of
7 the policy and practice of withholding due process indefinitely
8 while people are being detained.

9 But, as I said, we're happy to go back and discuss
10 amongst ourselves and get back to you on whether certification
11 to the State Supreme Court would be an appropriate approach
12 with respect to the statutory issues here, but we do think the
13 case should go forward on the constitutional claims regardless
14 of whether that question is certified.

15 THE COURT: The statute is set up to have a case run
16 smoothly. A patient comes in, a patient is evaluated, a
17 certificate issues, that in three days -- the patient is then
18 sent to a designated facility. Within three days the hearing
19 is held, and constitutional rights are preserved, the patient
20 is getting the treatment that that patient needs. That's
21 another unfortunate consequence of the present procedure, is
22 that these patients who are having a mental health crisis are
23 not receiving the treatment that they need in the hospital
24 emergency rooms while they're being held, and that is very,
25 very unfortunate. This statute is set up so that it's meant to

1 operate smoothly and taking into account treatment needs,
2 constitutional rights and what have you, and the fact that
3 numbers have increased that have resulted in a different
4 approach and with these different interpretations of the
5 statute now in order to try to make it fit into the existing
6 situation, that creates some serious problems.

7 Well, thank you very much, everybody.

8 MR. CURTIS: Thank you, your Honor.

9 THE COURT: I think this has gone relatively smoothly.
10 I miss being in person with all of you, but this is the way
11 things are for now. I thank you very much, and I hope you all
12 remain well.

13 MR. RAMSDELL: Thank you, your Honor. Same to you.

14 MR. GARLAND: Thank you, your Honor. Likewise.

15 MR. CURTIS: Thank you.

16 MR. GARLAND: Your Honor, very briefly and, I'm sorry,
17 because that was a very nice sendoff, I assume, by virtue of
18 that, that you're not looking for any additional argument with
19 respect to the takings claim or the Fourth Amendment claim, and
20 we're ready to rest on our pleadings with respect to that. We
21 do think state action is the major issue. We think those are
22 alternative grounds to dismiss the hospital's complaint. So, I
23 won't belabor that, but I just wanted to make sure you had no
24 questions on that.

25 THE COURT: No, I don't.

1 MR. GARLAND: Thank you very much, your Honor.

2 THE COURT: Thank you all.

3 MR. RAMSDELL: Thank you, your Honor.

4 MR. CURTIS: Thank you, your Honor.

5 MR. McGRATH: Thank you, your Honor.

6 (WHEREUPON, the proceedings adjourned at 11:30 a.m.)

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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *Doe, et al., v. NHDHHS, et al*, No. 18-cv-1039-JD

Date: 10/21/20

/s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter